REVISTA BRASILEIRA
DE DIREITOS DA PERSONALIDADE

POLITICAL CRISIS, HUMAN RIGHTS AND THE ISSUE OF THE VENEZUELAN REFUGEES IN BRAZIL

CRISE POLÍTICA, DIREITOS HUMANOS E A QUESTÃO DOS REFUGIADOS VENEZUELANOS NO BRASIL

Gabriel Mendes de Catunda Sales
UniCesumar, Maringá/PR, Brasil
https://orcid.org/0000-0003-2458-8753 | http://lattes.cnpq.br/2114989674175916

Eudes Vitor Bezerra
Instituto de Desenvolvimento e Aprendizagem, São Luís/MA, Brasil
https://orcid.org/0000-0003-1828-4833 | http://lattes.cnpq.br/2512954835653624

ABSTRACT: This essay addresses the issue of Venezuelan refugees in Brazil with focus on the universal tutelage of the human person and enforcement of the resulting rights. It uses the hypothetical-deductive method, based on the dialogue of the sources of the law, aiming at the legal analysis of the political crisis to the Venezuelan refugees.

Keywords: Brazil; Human Rights; Refugees; Venezuela.

RESUMO: O presente ensaio trata da questão dos refugiados venezuelanos no Brasil sob o enfoque da tutela universal da pessoa humana e efetivação dos direitos decorrentes. Utiliza o método hipotético-dedutivo, com esteio no diálogo das fontes do direito, objetivando a análise jurídica da crise política aos refugiados venezuelanos.

Palavras-chave: Brasil; Direitos Humanos; Refugiados; Venezuela.

1 INITIAL CONSIDERATIONS

Human Rights, as an axiological construct, are fruits of the historical process, a direct result of human relations from social struggles. They arise from human rationality insofar as they are consequences of processes of struggle for the dignity of the human person. In Brazil, there is a tradition of authors who are dedicated to these debates and their influence in the Brazilian legal context (see LAFER, 1995, PIOVESAN, 2004, DIAS, 2005, SOUSA SANTOS, 2001, COMPARATO, 2010 and others).

The declarations of rights introduce a notion that all humanity shares some common values, that is why it is possible to speak of a universality of rights, that is, seeking the defense of universality of values in the sense that they would be historically legitimate rights. However, it should be noted that this universal character of human rights arises slowly, from a formation based on philosophical thought, the recognition and the positivation of these rights. (BOBBIO, 2004, DIAS, 2005).

After the end of World War II, with the disclosure of the Nazi State crimes, the international community recognized the need to establish these rights, beginning a new era in the history of the category of human rights, namely a commitment to fundamental rights, which

Recebido em: 28/10/2023
Aprovado em: 08/12/2023

caused changes in the world scenario. Thus, there is the interest for the protection of the human person, since this person is above the States, being a holder and subject with rights in the international order. Human rights are implications of how the modern and contemporary person thinks about themselves, which values they consider as priorities and which demands they intend to face in relation to the political society, dealing with a constant production of historical consciousness that is being constructed in a complex, articulated way.

Despite the universalizing nature of the human rights tutelage, does its tutelage extend to all unconditionally? Is this debate over? Having these questions as a guidance, the study seeks to problematize the human rights tutelage and, therefore, its effectiveness. In order to do so, it addresses theoretical aspects concerning the formation of the subject of rights and its implication in the formation of the concept of human rights, the new contours and extension of this concept and, after that, it analyzes international challenges such as the migratory problem in Venezuela and the confrontation of the problem with the Brazilian legal system, questioning that, in this case, what is perceived is that its effectiveness does not always occur, which implies in questioning the very foundations of these rights.

In this sense, by adopting a hypothetical-deductive methodology based on certain theoretical references, the present study proposes to carry out a reflection on human rights and the challenges of their effectiveness in the current Brazilian context, especially with regard to the issue of migration of Venezuelans with respect to Original Civil Action no. 3.121, filed by the State of Roraima before the Union, whose debate rekindles the relationship between human rights and their effectiveness, especially based on a critical notion of the *end* of human rights, both in terms of closure and in the sense of the purpose of these rights.

2 THE FORMATION PROCESS OF THE HOLDER OF RIGHTS

The historical development of the concept of human rights is often associated with the evolution of Western philosophical-political thought. Celso Lafer argues that the emergence and triumph of human rights is the result of "a long process of maturation of conceptions of an ethical nature centered on the concepts of human dignity and universality of the human being, above all particularisms" (LAFER, 1995, p. 171).

In legal positivism, the law represents a totality of rules and regulations whose purpose is to regulate the human conducts, where the rights are directly related to the subjects and the set of rules that govern the legal order. Thus, there is a relationship that binds everyone, that is, the legal subject is the subject of rights through the operation of a legal norm that assigns

rights and duties to the subjects. The legal subject is, therefore, a constructed subject, a legal fiction (DOUZINAS, 2000; CAPPELLARI, 2014, p. 105).

The formation of Modern thought has introduced new ways of understanding the society, the individual, and the scientific knowledge. The insertion of the individual at the center of social relations implied in thinking also in a subject that is free to make choices, to enter in contracts and, even more, free to establish rules and regulations that determine their conducts. (CLAPHAM, 2007, p. 19)

The modern individual is a free and responsible one, who establishes a set of legal norms to protect themselves through their own instrumental rationality. With this, the arising subject of right represents both the one who creates the law and the one who is directly subject to it. "The constitution of modernity, which began with the premise of supporting the natural freedom of the individual, is overturned by a hyperinflation of norms; the subjects breathe where the rules speak, there can be no rules without a subject and no subject without a rule" (CAPPELLARI et al., 2014, p. 106).

According to the thinking of the Austrian jurist, Hans Kelsen, in his book "Pure Theory of Law", the private individual is not an individual, but "the personified unity of the juridical norms that compel and empower the same individual" (Kelsen, 1998, p. 194). The legal order grants, so to speak, a personality to this individual, that is, a legal construction in which the private individual becomes a legal person).

> Being a person or having legal personality is the same as having legal duties and subjective rights [...]. The private individual or legal person who "has" – as its bearer – legal duties and subjective rights that are subjective, is a complex of legal duties and subjective rights whose unity is figuratively expressed in the concept of person. The person is only the personification of this unit. (KELSEN, 1998, p. 192-193).

We can realize that all this conceptual construction implies in justifying that the subject of right is the intermediate point between the abstract nature and its concreteness, insofar as the norm grants juridical personality and, therefore, transforms them into a subject of rights and duties (KELSEN, 1998; REISMAN, 1990; STIGLITZ, 2003).

The law belongs not only to humans, but, in fact, "manufactures the humans, not only by recognizing their legislative capacity to produce rights and their free will, but also by endowing them with the concrete powers and capacities through which they can concretize their free will" (CAPPELLARI et al., 2014, p. 106). The character of the law is expansionist precisely because of this argument pointed out by the authors, that is, by precisely being in continuous expansion and proliferation.

With the emergence of the subject of rights, there is concomitantly the emergence of struggles for recognition, from which subjectivity and personality are formed, and achieved through a dialectical process in which a subject has their recognition as a subject of rights, insofar as they also make this recognition with respect to another subject of rights. (DIAS, 2005, p. 32)

> [...] the main function of rights is to help establish the necessary recognition for the constitution of a complete personality. Subjectivity passes through the mutual recognition of the Other, and rights are a necessary and indispensable intermediary in this process. To understand ourselves as holders of applicable rights and claims, in other words, to recognize ourselves as legal subjects, there must be a system of general norms that impute us the duties necessary to recognize others as holders of rights.
> [...] Legal relations presuppose a universalist morality that forms the background of the law and ensures that people are treated as ends and not as means. Secondly, the recognition of the Other as a legal person is the effect of the fact that they enjoy autonomy and moral responsibility and have legal rights (respect for the dignity of the human person). (CAPPELLARI et al., 2014, p. 107).

This dialectical relationship of reciprocal recognition involves the understanding of the other generalized by the legal norm. From this, there is the adoption of respectful attitudes towards the other, in the sense that there is the recognition of their legal personality, that is, that they are also holders of rights, whose claims must be heard. (BOBBIO, 2004, p. 3; LUÑO, 2001, p. 132)

Recognition through law leads to respect for the other as such, that is, a person as an end in themselves. That is why we speak of the dignity of the human person and, nevertheless, of human rights (SPARER, 1984, p. 52). Historically, these concepts have emerged to protect the rights of individuals who, with Modernity, have come to occupy the center of decisions as free and reasoned subjects, which enables them to make moral decisions and legal claims.

3 HUMAN RIGHTS IN CONTEMPORANEITY

In this context of the creation of legal personality, there was also the need to contingently create human rights to precisely account for these new forms of social relations and philosophical conceptions that were emerging in modern time. In spite of their constant updating and their historical and contingent character, human rights can be presented as natural, declared above Politics, "but they are the construction of political relations and the continuous struggle for recognition. [...] they can be proclaimed as rational, but they are, in part, the result of an all-powerful desire that challenges legal and logical boundaries" (CAPPELLARI et al., 2014, p. 108).

In the beginning of book "The Age of Rights", the Italian thinker Norberto Bobbio argues that human rights, democracy and peace are what the author calls three historical moments, since "without recognized and protected human rights, there is no democracy; without democracy, the minimum conditions for the peaceful solution of conflicts do not exist" (BOBBIO, 2004, p. 1). According to the author, it is generally assumed that human rights "are desirable things, that is, the goals that deserve to be pursued, and that, despite their desirability, not all of them have been recognized (everywhere and in equal measure)" (BOBBIO, 2004, p. 15-16).

Commenting on the theory of human rights and its evolution, Bobbio starts from a conception from what he calls "generations of rights." The first generation refers to fundamental rights, fruits of struggle against authoritarian governments, whose purpose was the limitation of state action and the preservation of human life, freedom and equality, ideas of the French Revolution of 1789. (BOBBIO, 2004; DIAS, 2005, p. 12; CLAPHAM, 2007, p. 30).

While the rights of the first generation appear as negative rights, since they seek to represent limits to the State, in contrast, the second generation rights are positive, that is, they demand concrete actions by the state power in promoting the dignity of the human person, in which a positive position on the part of the State is affirmed, and should promote and protect rights related to a dignified life, namely, access to health, education, housing, work and so on (LUÑO, 2001, p. 22; PIOVESAN, 2006, p. 19).

Bobbio still seeks to argue that as of the twentieth century a third generation of rights emerges, whose concern is the protection of life on Earth – aiming at preserving the environment, for example, concerning the right to live in an unpolluted environment – and a fourth generation of rights, which would include rights specifically related to political life, namely, the protection of genetic heritage, concerns about bioethics, and so on. However, he recognizes that they constitute a category "still excessively heterogeneous and vague, which prevents us from understanding what it effectively is about" (BOBBIO, 2004, p. 5).

Thus, what is perceived with this historicity of human rights is that these generations of rights are constantly changing as new needs and challenges arise, in which "third-generation rights, such as living in an unpolluted environment, could not have been even imagined when the second-generation ones were proposed" (BOBBIO, 2004, p. 6). Some authors go far beyond the Bobbian argument, understanding that, as social demands advance and change, Bobbio's classification also expands, with new elements appearing to compose what is meant by human dignity, fostering the emergence of new generations of rights to safeguard human dignity in its multiple dimensions. (BACCELLI, 2010)

However, the point is that it is necessary to look with reservations and to make a critical reading about this argument that constantly and incessantly inserts elements to compose new generations of rights, implying not only in the banalization but also the expansion of the Bobbian theory more than it allows itself in its core, by losing the rigor and the comprehensiveness of the author's theory. (BOBBIO, 2004, p. 6-7; COUZINAS, 2000, p. 317-318)

The first phase of the formation of the Declarations of Human Rights is based on the works of thinkers who seek to argue that the civil State would be the artificial creation that would have no other purpose than promoting social peace, safeguarding minimum rights such as freedom and equality. These rights are not presuppositions, but rather the result of struggles and social demands. (DIAS, 2005, p. 18).

The second phase begins with the positivation of these rights, that is, there is a struggle for the recognition of rights and, afterwards, the moment in which these theories are welcomed for the first time by a system of positive laws, such as in the case of the Declarations of the Rights of the American States and the well-known text of the Declaration of the Rights of Man and of the Citizen of 1789. This moment provides a distance from absolutist power, forming a new conception of State. (DIAS, 2005, p. 302)

The third phase is characterized by the formation of human rights declarations, beginning with the end of a period of war, with the Universal Declaration of Human Rights, when there is the affirmation of rights in a universal and positive scope, in the sense that the recipients of these rights are not only citizens of a particular country but everyone is unconditionally encompassed. (DIAS, 2005, p. 303; SPARER, 1984; REISMAN, 1990)

More than the recognition and historicity of human rights, the challenge is to make them effective (BOBBIO, 2004, p. 9). Human rights, as they are presented in the strictly legal sphere, as fundamental rights, do not constitute only rights of the citizens respected by the State of their sphere of freedom and also that they derive a minimum of equality between them, because they are affirmed in relation to other individuals, as well as they present themselves as objective guidelines for the organization of the State and as a parameter for the foundation of their policies. (DURÁN, 2002, p. 102; CARRILLO SALCEDO, 1995, p. 63)

According to José Francisco de Assis Dias, human rights "are laws *per se*. Even if their use is entrusted to the Subject's discretion, yet such freedom does not extend to the power to take them out of someone. Human rights are *inalienable* and *unavailable*" (DIAS, 2005, p.87).

The subject of right configures both the one who creates the law and the one who is directly subject to it, making the constitution of modernity, "which began with the premise of supporting the natural freedom of the individual, be overturned by a hyperinflation of norms:

subjects breathe where the rules speak, there can be no rules without a subject and no subject without a rule" (CAPPELLARI et al., 2014, p. 106).

According to Flávia Piovesan, the contemporary conception of human rights "composes an axiological construct, the fruit of our history, our past, our present, from a symbolic space of struggle and social action" (PIOVESAN, 2006, p. 6). These rights emerge from struggles for human dignity and the realization of social rights. As Couzinas (2000, p. 318) also acknowledges, "the ideological triumph of human rights is paradoxically consistent with the empirical observation that our epoch has witnessed their greatest violations".

> Human rights, as a desire, constitute a battlefield with an ethical dimension. Social conflict may occasionally be destructive of social commitment, but it is not necessarily so, since every form of human antagonism involves claims of recognition, and if this is understood, catastrophic forms of conflict can be avoided. Thus, every conflict involves mutual claims of recognition between the parties and presupposes an already active, albeit elementary, form of subjectivity. This way, recognition denied by oppression is not that of mutual respect or political participation. Oppression denies the much more specific recognition enjoyed by a person in his or her uniqueness and integrity, recognition of their specific abilities and aspirations, and their particular desires and needs. This kind of recognition would approximate the division between the political community and its rights, and the civil society with its inequalities. (CAPPELLARI et al., 2014, p. 108)

Human rights represent expressions of the struggle for recognition, which in turn builds and constitutes the political community. Along these lines, the contemporary conception of human rights arises out of movements of resistance and struggles for recognition of rights, with the advent of the Universal Declaration of 1948 – a period after the end of World War II and Nazi barbarism – reiterated by the Declaration of Rights, Vienna, 1993. (DURÁN, 2002, p. 85)

> This conception is the result of the movement to internationalize human rights, which is an extremely recent movement in history, emerging as a response to the atrocities and horrors of Nazism after the war. By presenting the State as the great violator of human rights, the Hitler era was marked by the logic of the destruction and disposability of the human person, which resulted in sending 18 million people to concentration camps, with the death of 11 million, of which 6 million were Jews, in addition to communists, homosexuals, gypsies... The legacy of Nazism was to condition the ownership of rights, that is, the condition of subjects of rights, to the pertinence to a certain race – the pure Aryan race. (PIOVESAN, 2006, p. 6-7)

An important point of the author's argument is about the destruction and what she called the "disposability" of the human person, that is, those lives that did not have any tutelage provided by the system of law, removing the condition of subjects with rights, that is, withdrawn from their personality and dignity, from their very condition of a person. Now, withdrawn and

deprived from the status of person, there is a scenario of total rupture with respect to human rights. (PIOVESAN, 2006; KAUFMAN, 2019)

Faced with this, the need arises for a conception of human rights at the international level, beginning to draw up an "international normative system for the protection of human rights. It is as if we projected a version of a global constitutionalism, designed to protect fundamental rights and limit the power of the State, through the creation of an international apparatus for the protection of rights" (PIOVESAN, 2006, p. 7).

The Universal Declaration of Human Rights, approved in December, 1948, condensed all the richness of the theoretical elaboration of human rights and the historical essence of the human person by positivizing that everyone has the right to be unconditionally and everywhere recognized as a person (COMPARATO, 2010; CARRILLO SALCEDO, 1995). However, this alone has not eliminated ethical-legal problems, quite the opposite. "The technological advance does not cease to create new and unforeseeable problems, waiting for a satisfactory solution, in the ethical field" (COMPARATO, 2010, p. 31).

Human rights have a field of cosmopolitan tutelage, representing the recognition of the human being as an end in itself and not merely as a means, "having *a right to a place in the world*; a world that finds common ground between Ethics and Politics through the converging association of three major themes: *human rights* and *democracy* in the internal level, and *peace* at the international level" (LAFER, 1995, p. 172).

Celso Lafer points out that one of the first international actions in the international scope in the name of human rights occurred in the 19th century in England in the fight against the slave trade. According to the Brazilian thinker, the English initiative whose purpose was to eliminate the slave trade was "the need to suppress practices – slavery and trafficking – incompatible with the level of economic and political modernity achieved by that country" (LAFER, 1995, p. 173).

The international action, while meeting the aspirations of ethnically inspired groups of humanists – who founded the Anti-Slavery Society in 1839 in London, one of the first NGOs to promote human rights – also served English national interests.

> The other international action of universal scope linked to human rights in the nineteenth century was the initiative of Henri Dunant, a Geneva merchant who witnessed the horrors of the Battle of Solferino, to organize an international conference on the rights of victims of armed conflict. This initiative resulted in the First Geneva Convention (1864), which affirmed humanitarian law, as well as the creation of the Red Cross. It was conceived as an independent and apolitical NGO, acting at the international level as a neutral interlocutor in the humanitarian field, aimed at the protection and assistance of military and civilian victims from the evil of international conflicts, civil wars and internal tensions generated by violence. In this case, the interest of States in signing the Convention also fits in with the Grotician perspective, of common interests

> in disciplining the use of force, even though the motivation of the creator of the Red Cross was eminently ethical. The same applies to the signature by some States, including Brazil, of the St Petersburg Declaration of 1868 on Explosive Bullets, which is the origin of the other branch of positive humanitarian law, the so-called Hague branch, which is concerned with restricting the means used in war to avoid human suffering as much as possible. (LAFER, 1995, p. 173)

Still on the concept and scope of human rights, Paul Farmer (2003, p. 212) argues:

> The concept of human rights may at times be brandished as an all-purpose and universal topic, *but it was developed to protect the vulnerable*. The true value of human rights movement's central documents is revealed only when they serve to protect the rights of those who are most likely to have their rights violated. The proper beneficiaries of the Universal Declaration of Human Rights […] are the poor and otherwise disempowered. (Emphasis added)

Farmer argues that the beneficiaries of human rights par excellence would be the poor and other vulnerable people, but it is necessary to understand that it is not only about benefits, but also the unconditional protection of the human person (FARMER, 2003). The contemporary conception of human rights "is characterized by the processes of universalization and internationalization of these rights, understood under the prism of their indivisibility" (PIOVESAN, 2004, p. 25).

The continuous expansion of rights demonstrates its essence as a combination of law and conflicting human relations. This involvement highlights the important presence of the other in action and denotes the right as a set of signs that help understand the identity of individuals in their relationship with the world. Human rights constitute a formal contour to the subjects, through the recognition of the legal person (*juristische Person*) (KELSEN, 1998), not only by regulating the way in which they are inserted in the world, but also the way in which they relate to other persons holding rights and prerogatives. (LAFER, 1995; KRISCH, 2008)

> Human rights build human beings. I am human because the Other recognizes me as such, which, in institutional terms, means that I am recognized as a holder of human rights. Nothing in their essence prevents them from having rights, nor does it assure this to them. Slavery was abolished only when the difference between living beings and slaves was reinterpreted. Campaigns of extermination and genocide have shown that the formal admission of human beings to the dignity of the human person is not irreversible. The concentration camp prisoners, Cambodians, Rwandans or Serbs were built as nonhuman parasites, as beings so inferior and dangerous to the wholly human being that their extermination consisted of a natural necessity. (CAPPELLARI et al., 2014, p. 111)

The problem of universality has to do with the foundations of human value attributed to human dignity, because, according to Costa Douzinas, rights are directly related to human nature. Dias (2005, p. 291) argues that the foundation of human dignity is also the foundation of human rights, and that thinking about a foundation that is universal to support a universal

dignity also means thinking about what he calls – taking up the thought of Thomas Aquinas – *essentia hominis*, a *humanitas* (DIAS, 2005, p. 291).

In this sense, thought by Dias, the universality of human rights must be thought of as the universality of their foundation. This *humanitas*, of which the author emphasizes, "as a universal foundation, it gives the rights that it also underlies, the *note of universality*: only in this sense can we think of it" (DIAS, 2005, p. 292). The problem concerning research on the foundations of human rights is directly related to the notion of universality, an element that is essential for overcoming the particularisms of the various existing cultures. In the international order, human rights draw their strength from the suffering of the past and the injustices of the present in order to ground the dynamic and constant struggle for recognition and realization of rights for all people.

4 PRESERVATION OF FUNDAMENTAL RIGHTS IN THE INTERNATIONAL LEVEL

In the debate about the foundations of human rights, questions arise concerning the action scope of human rights norms, that is, whether they would be norms with universal validity or whether they would be relative according to the territory or culture. According to Piovesan (2006, p. 12), universalists defend that human rights are intrinsic to the human condition, that is, there would be no exception in the protection of these universal rights. Regarding relativists, the author argues that the notion of rights is related to the political, economic, social, and cultural system of societies, that is, each "culture has its own discourse about fundamental rights, which is related to specific cultural and historical circumstances of each society" (PIOVESAN, 2006, p. 12).

> The realization of greater protection of human rights is linked to the overall development of human civilization. And it is a problem that cannot be isolated, under the penalty of not exactly not solving it, but not even understanding it in its real dimension. Whoever isolates it has already lost it. One cannot put the problem of human rights apart from the two greatest problems of our time, which are the problems of war and misery, the absurd contrast between the excess of power that created the conditions for an exterminating war and the excess of impotence that condemns the great masses of humanity to hunger. Only in this context we can approach the problem of rights with a sense of realism. We should not be pessimistic enough to abandon ourselves to despair, but we should not be so optimistic so that we become presumptuous. (BOBBIO, 2004, p. 44)

The debate on the scope of human rights is of the utmost importance, and the issue of refugees is directly related to this problem: depending on the conception of human rights, this

will be of fundamental importance to protect all indiscriminately – encompassing refugees – or not.

In this debate, Piovesan also highlights the reading of Boaventura de Sousa Santos, who advocates a multicultural conception of human rights, in order to formulate and compose a kind of multiculturalism (PIOVESAN, 2006, p. 13). Human rights "have to be reconceptualized as multicultural. Multiculturalism, as I understand it, is the precondition of a balanced and mutually empowering relationship between global competence and local legitimacy" (SOUSA SANTOS, 2001, p. 12).

According to Carlos Villán Durán's interpretation (2002, p. 85), international law, especially with regard to human rights, consists of a system of principles and norms that seek to govern international cooperation among states whose fundamental purpose is to promote "the respect of universally recognized human rights and fundamental freedoms, as well as clarifying the mechanisms for guaranteeing and protecting those rights". (DURÁN, 2002, p. 85-86).

Piovesan (2006) points out some challenges present in the international order, namely the debate between universalists and cultural relativists; the question of state secularism and religious fundamentalisms; the challenge of how to relate the right to development and the question of global asymmetries; and he inserts the difficulty arising from the process of economic globalization and the flexibilization of social rights as an international challenge, that is, how to reconcile globalization with the protection of economic, social and cultural rights; there is also the challenge called "war on terror" and guaranteeing and preserving public rights and freedoms.

Another challenge of extreme relevance in the international order would be the challenge of respect for diversity and intolerance acts – something that directly concerns the issue of refugees not only globally, but also in the context of Venezuelan refugees –, since the process of violation of human rights primarily affects those social groups considered to be the most vulnerable ones. The problem of intolerance, especially with regard to refugees, is of paramount importance in the study on the end of human rights, exactly because the concept of human rights arises precisely to protect vulnerable social groups (FARMER, 2003, p. 212).

Concerning minorities and refugees, the countries' international concern was the creation of "conditions capable of preventing crises related to these two [minorities and refugees] problems from reaching levels that would endanger international peace" (LAFER, 1995, p. 174). According to the author, all the construction of these rights was due to the catastrophes of World War II, that is why there is a need to support international norms for the protection of human rights, since "human rights can no longer be a matter exclusively

addressed by States and because some kind of international control is necessary to contain the active and passive evil prevailing in the world" (LAFER, 1995, p. 174).

Thus, since the beginning of the process of codifying human rights – whether in declarations or in constitutional charters –, there was a tendency to expand them. This way, the list of rights was never definitive, always adding new rights to be proclaimed. (MARTINEZ, 2012, p. 222-223; REISMAN, 1990; BOBBIO, 2004)

This tendency of broadening human rights continues to be a "clear symptom that humans are more and more aware of their own inalienable human dignity, autonomy, patrimony of *personal* liberties: in a word, they become aware of their *humanitas*" (DIAS, 2005, p. 315).

Emma Larking (2014, p. 160) demonstrates that democratic States generally seek to permanently exclude refugees, not providing them with citizenship, "the integrity of the law is undermined by their presence as it is undermined by the border policing regimes that are designed to exclude refugees from access to the law".

Refugees who occasionally try to force their way into a particular political community, that is, without the proper authorization of the so-called liberal democratic state, according to the author, “come into contact with its law – even if only via the exceptional measures through which border regimes are managed, *and they suffer its coercive power but they are afforded neither recognition nor protection under it*” (LARKING, 2014, p. 160. Our emphasis).

This is exactly the central point, that is, bringing to the current Brazilian context, Venezuelan immigrants who may try to enter the country are confronted with a totally hostile scenario by the population[1], lack of preparation and negligence on the part of the State, being totally hopeless, without effective legal protection, forcing a position of the judiciary in face of this question of great social relevance and current questions about the inefficacy of human rights, with implications not only for Brazil, but throughout Latin America. (PIOVESAN, 2006; DURÁN, 2002; SOUSA SANTOS, 2001).

5 HUMAN RIGHTS CRISIS: THE VENEZUELAN REFUGEES AND THE STF

Divided into two parts, Costas Douzinas' work on the end of human rights offers an alternative history of natural law, in which natural rights are represented as the eternal human

[1] There are examples of violence by Brazilians against Venezuelan immigrants in the city of Pacaraima, in the border with Venezuela. The Brazilians' attacks on the camp – they burned clothes, documents and a few belongings that some families owned – forced them to flee back to their country of origin. Reportage available on: https://brasil.elpais.com/brasil/2018/08/19/internacional/1534701044_585193.html. Access in: 15 set. 2018.

struggle to resist oppression and fight for a society in which human people are valued and not despised. At the time of its emergence, in the eighteenth century and again in the popular revolts of the 1990s, human rights have become the dominant critique of law and society. The radical rhetoric of the symbolic value of the doctrine of rights and its seemingly endless expansive potential led to its adoption by governments and individuals seeking to justify their actions on moral grounds, and it undermined their radicalism. The second part examines the philosophical logic of rights.

The contribution and criticism of the German philosopher Karl Marx illuminates the traditional approaches to the concept of human rights. Marx criticizes the supposed universalist character of the rights of man and of the citizen in his work "On the Jewish Question", critically thinking about who this man and this citizen would be, that is, it is questioned if in fact there would be a subject of universal rights or if all this would be mere rhetoric, empty of meaning. According to Douzinas (2000, p. 159), "the rights of man were the dominant ideology of the revolution. These rights belong to the abstract universal man but they promote, in practice, the interests of a very concrete person, the selfish and possessive individual of capitalism".

> The rights of man, like all rights, are not natural or inalienable but historical creations of state and law. Their emergence and dialectical operation is quite complex: while the separation between state and society was the outcome of economic changes in society, the state turned the conditions of existence of capitalism, which brought it to life, into legally recognized rights and consecrated them as natural and eternal. Human rights are therefore real and effective but they achieve much more different from what is apparent. (DOUZINAS, 2000, p. 161)

Douzinas (2000, p. 198) still argues that the work of existentialist philosophers was also important in deconstructing the metaphysical essentialism of both universalists and cultural relativists. Finally, through consideration of the ethics of otherness and with reference to recent violations of human rights, it is argued that the end of human rights is to judge law and policy from a moral point of view that transcends the present and is historically relevant. This is a comprehensive examination of the human rights discourse and practice. Using examples of ethically justified foreign policy and the war in Eastern Europe, the book argues that human rights will come to an end unless their utopian ideal is re-evaluated and introduced into practice. (BACCELLI, 2010)

“Human rights are the fate of postmodernity, the energy of our societies, the fulfilment of the Enlightenment promises of emancipation and self-realisation” (DOUZINAS, 2000, p. 1). However, while human rights triumphed on the world stage as the ideology of postmodernity, it is clear that our era witnessed more violations of human rights than any previous one without the influence of the Enlightenment. Douzinas (2000) fills the historical and theoretical gap and

explores the powerful promises and disturbing paradoxes of human rights, that is why we speak about the end of human rights.

> The triumph of human rights and the accompanying “end of history” may conceal a final mutation in the long trajectory of natural law, in which the call of nature has turned from a defense against conventional wisdom and institutional lethargy into the legitimating device of some of the most sclerotic regimes and powers. As human rights start veering away from their initial revolutionary and dissident purposes, as their end becomes obscured in ever more declarations, treaties and diplomatic lunches, we may be entering the epoch of the end of human rights and of the triumph of a monolithic humanity. If human rights become the “realized myth” of postmodern societies, this is a myth realized only in the energies of those who suffer grave and petty violations in the hands of the powers that gave proclaimed their triumph. Human rights are the negative principle at the heart of the social imaginary. The end of human rights, like that of natural law, is the promise of the “not yet”, of the indeterminacy of existential self-creation against the fear of uncertainty and the inauthentic certainties of the present. When the apologists of pragmatism pronounce the end of ideology, of history or utopia, they do not marl the triumph of human rights; on the contrary, they bring human rights to an end. The end of human rights comes when they lose their utopian end. (DOUZINAS, 2000, p. 380)

From the time of their birth, human rights have become the dominant critique of conservatism as a rule in law. However, radical energy, symbolic value, and the expansive potential of rights to the human person have led to their adoption by both governments that wish to justify their policies on moral grounds and by individuals who have fought for public recognition of rights and insertion in that mechanism.

Through consideration of the alterity ethics, and with reference to recent and constant violations of human rights, the thinker argues that the end of human rights represents the act of taking law and politics from a position of moral transcendence. A comprehensive historical and theoretical examination of human rights discourse and practice is made, drawing on examples of external policies in Iraq – in direct reference to the United States –, Rwanda and Kosovo, leading Douzinas (2000) to argue that the defensive and emancipatory process of human rights will come to an end if we do not reinvent their utopian ideal, let alone rethink and strengthen their scope of tutelage. According to the author, "the non-recognition or violation of a human right puts on stage and emphasizes the difficulties of the always fragile project of identity formation through other-recognition” (DOUZINAS, 2000, p. 321).

By speaking about the end of human rights, we are dealing with two meanings of the term "end", that is, in the sense proposed by Douzinas of closure and erasure of what could traditionally be understood as universal legal protection, but also in the sense of "purpose", that is, of questioning what the objectives of human rights are. By proposing to discuss the purpose of human rights, one can not only verify whether or not these rights are applied, if they fulfill the proposed purposes, but also to reach an understanding of their limits regarding the

universal protection of the human person, being able, from this, to increase the scope of tutelage over human life and to work towards the realization of these universal rights.

In the lawsuit filed by the State of Roraima against the Union, the State Government denounces what they call the "omission of the Union in the control of national borders [...]", arguing that this directly provoked a disharmony and "[...] undue encumbrance to federal entities "(RORAIMA, 2018, p. 2), with the request that the Union would be obliged to:

> [...] adopt an effective action in the Brazilian-Venezuelan border area, in order to prevent the disorderly immigration flow producing more devastating effects to Brazilian society, specifically in the State of Roraima, forcing the Union to promote administrative measures in the area related to police control, health, and sanitary surveillance, under penalty of maintaining the unwanted disturbance of the Federative Pact and an unconstitutionally critical state of things, systematically violating, due to inaction in the area of its competence, human rights related to safety, health and sanitary surveillance [...]. (RORAIMA, 2018, p. 36)

Then, in the Civil Action no. 3.121 proposal before the Supreme Court of Justice, under the rapporteur Minister Rosa Weber, the Federal Supreme Court was required to grant early protection in order to oblige the Union to promote administrative measures in the basic areas such as police control, health, sanitary surveillance in the border region between Brazil and Venezuela; that the immediate transfer of additional resources be determined in order to meet the costs of the federative entity with the provision of public services to immigrants and, finally, the Union was required to temporarily close the border between Brazil and Venezuela or even that the access of Venezuelan immigrants to Brazil was limited.

What is perceived is that the state government seeks to exempt itself from its responsibilities, placing all the responsibility unilaterally on the Union in the matter of managing the migratory flow and welcoming Venezuelans (MILESI; COURY; ROVERY, 2018, p. 57).

> In the constructed narrative, the clear intention is to hold the Venezuelans exclusively responsible for several problems observed in Roraima, many of which have structural causes and were already present even before the present migratory conjuncture. In doing so, local politicians seek to extricate themselves from their responsibilities for the precariousness of public services, diverting attention from the real causes of the problems and using immigrants as scapegoats. This strategy is noticeable in ACO 3121, which calls for the closure of the border based on elements such as the risk of "possible epidemics" and "increased crime". (MILESI; COURY; ROVERY, 2018, p. 57)

The Original Civil Action no. 3.121 has the premise that there would be no doubt that "... the uncontrolled entry of Venezuelans by the Brazilian-Venezuelan border has caused enormous losses to the population of this state which is the smallest state of the Federation" (RORAIMA, 2018, p. 11) , a discourse model that is made from combinations of "facts and real

data in a simplistic way, often taking mere correlations as causal explanations or even misrepresenting and manipulating the facts to arrive at conclusions that promote the aversion to the immigrants" (MILESI; COURY; ROVERY, 2018, p. 57).

Moreover, the discourse that the Action is based on is full of xenophobic assumptions, as the local Government itself blames the flow of migrants for the "appearance of diseases previously eradicated in this country, such as measles" (Roraima, 2018, p, 11-12), making Venezuelans responsible and thus creating an entire context of hate and disrespect for the human rights of those who find themselves in that situation of calamity.

> Since 2017, Venezuela has been facing an epidemic of measles and there are, in fact, indications that the virus circulating in Brazil is related to this situation in the neighboring country (MINISTRY OF HEALTH, 2018). However, the discriminatory argument is evidenced by observing the proposed solution to deal with the outbreak of the disease, that is, the creation of a border health barrier. Thus, instead of focusing on containing the circulation of the virus through vaccination campaigns, it is proposed to prevent the movement of people, an argument repeated several times by local rulers and also by Roraima's parliamentarians. By analogy, it would be as if the fight against the outbreak of measles that occurred in Ceará depended on impeding the mobility of the state's population in the national territory, something that sounds absurd.
> Therefore, real facts are being used, but the conclusions are fallacious. In the case of malaria, for example, after six years of decline, in 2017 the disease started to grow again in Brazil. Opportunistically, the local authorities began to associate the increase of cases of the disease with the migratory flow. However, experts attribute the increase to the reduction of investment in malaria actions and, despite the National Health Surveillance Secretariat declares that there is "no relation between the increase [in the number of malaria cases] and the immigration of people from Venezuela", this argument continues to be reproduced and is included in the ACO 3121. (MILESI; COURY; ROVERY, 2018, p. 58)

The authors point out that the State of Roraima used an argument in the sense that the increase in violence and crime in the state was also a direct result of the migration process and the arrival of the Venezuelans in Brazil, mentioning data from the Civil Police that shows a growth in the number of homicides in the state, making an association with the migratory flow (MILESI; COURY; ROVERY, 2018, p. 59).

At a certain point in the STF's decision, the concept of refugee is addressed, in order to differentiate it from the concept of migrant, something that would result in a differentiated tutelage for each one of the categories, with direct implications for the realization of human rights. However, the reasoned argument provided an understanding in favor of the extension of the protection of the migrant, although not properly called refugee – Conf. Original Civil Action (ACO) 3121 - (BRASIL, 2018, p. 16).

With an argument focused on the defense of humanitarian acceptance, there is a search for the maximum effectiveness for the protection of human rights and the dignity of the

human person. The decision mobilized arguments in order to justify that the protection of the refugees is taken as a "solidly internalized rule in the Brazilian legal system. And the protection of refugees is closely linked to the protection of human rights" (BRASIL, 2018, p. 22).

Once the foreigner is found in the national territory, instead of compulsorily sending them back to the country where their life or freedom would be at risk, the decision was shown to defend the exact opposite, that is, that it would be necessary to adopt the acceptance in order to maintain consistency with the rules of international law:

> [...] the immediate humanitarian acceptance, prior to the analysis procedure and possible formal approval, of the Executive Power, is a measure that comes from all the international norms that Brazil adhered to. Then it is affirmed that the extension of the concept of *refugee* generates, to the State, a *duty of humanitarian protection* and, on the other hand, a *fair expectation* in those who enter or are about to enter the Brazilian territory, so that their condition is recognized as such, or at least can be submitted to the evaluation of the competent agencies.
> [...] Domestic legislation recognizes, I repeat to exhaustion, according to the international community, the specific rights and particular needs of refugees and other persons in need of international protection. Along this line, art. 8 of Law 9.474/1997 says that "*the irregular entry into national territory does not constitute an impediment for the foreigner to seek refuge from the competent authorities*". It is therefore imperative that the entry lanes should not be so impervious to the point of making the obligation of *non-refoulement* be an ineffective law. (BRASIL, 2018, p. 29)

In this sense, the decision of the Federal Supreme Court also showed that although the majority of those who crossed the border between Venezuela and Brazil do not fit into the hypothesis legally conducive to refuge or asylum, "the possible order to close the border between the two countries has the potential of impacting the situation of individuals who, within a mixed migratory flow, can live up to the qualified protection provided for in international law and accepted in the national legislation " (BRASIL, 2018, p. 29).

> Therefore, in case of an irregular migratory flow, the migratory management measures that may be adopted cannot contradict the commitments assumed in the international treaties to which Brazil is a party, in order to remain available to the effective protection of refugees, if the situation requires it.
> On the other hand, even when they are not covered by a valid assumption of international refugee protection standards, irregular immigrants are often vulnerable people who are entitled to the general protection afforded by the basic instruments for the protection of human rights, applicable to any irregular migratory flow situation. (BRASIL, 2018, p. 29-30)

In the arguments put forward in the introduction of the ACO 3121, the demanded measures would have the objective of avoiding possible systemic violations of human rights. However, it should be stressed that measures aimed at restricting migration not only fail to meet the objective of preventing it, but also serve to stimulate human trafficking and smuggling of migrants, strengthening criminal networks and exposing those who are already in the

situation vulnerable to the risks of violations of their rights" (MILESI, COURY; ROVERY, 2018, p. 62), implying, basically, in human rights violations.

Given this, considering that the crisis in Venezuela is recognized as a serious human rights violation, "imposing barriers to Venezuelan migration would be inhumane. Such a measure could cost the lives of thousands of people who in Venezuela are no longer able to feed themselves, have access to health services and meet their basic needs" (MILESI; COURY; ROVERY, 2018, p. 62).

Despite recognizing the difficulties involved in hosting thousands of people, considering the difficulties of the Brazilian public services, "it is not justified, due to the difficulties that refugee accommodation naturally brings, to start with the easiest solution of closing the doors", which in the hypothesis is equivalent to "closing the eyes" and "twiddling one's thumbs" (BRASIL, 2018, p. 33).

The Federal Supreme Court, represented by the rapporteur Minister Rosa Weber, in the Original Civil Action (ACO) 3121, being commented now, ruled on the rejection of the requests regarding the temporary closure of the border between Brazil and Venezuela, as well as rejecting the request to limit the entry of refugees in Brazil.

In short, the understanding is that in the democratic state of law, possible solutions available to these crises are restricted to solutions compatible with the constitutional and international standards of guarantee and maintenance of fundamental human rights. (BRAZIL, 2018, p. 30). By closing the borders, the State indirectly chooses to keep potential refugees in danger by placing the right to refuge and humanitarian assistance in direct conflict, ignoring human rights and acting only in the name of local sovereignty and interest.

6 CONCLUSION

The safeguarding of human rights and fundamental freedoms has become an integral part of the international legal order. The individual is protected not only by their country, but has also been transformed into a subject of international law, and there is a need for an effective system of legal protection.

These rights are marked by the notes of humanity, universality, equality, immutability, objectivity, indispensability and inviolability, in short, they are directly related essentially to the fact of being human. The generations of these rights are fruits of the historical movement and constant improvement of social relations; however, the current problem concerns the realization of these rights by the States.

The refugee crisis and the increasing migration around the world call into question the effectiveness of these rights, as there are constant reports of human rights violations. The management of the migratory flow of Venezuelans has represented a great challenge that requires the articulation among Brazilian public entities, in the most diverse levels, in cooperation, so that everyone can comply with the legislation and guarantee the effectiveness of human rights.

The lack of communication, the omission of the authorities at the various levels and the lack of enforcement of these rights imply in the growth of discriminatory processes and acts of violence against immigrants. In this context, in terms of purpose, it can be said that human rights are born from a collective effort of the international community precisely to protect human life unconditionally, without barriers or borders, safeguarding minimum rights for a dignified life. The humanitarian attitude, the dignified and equal treatment are marks of human rights consecrated from the struggles for recognition of rights.

However, if the purpose of human rights is the unconditional tutelage of human life, they have come to an end, because although the STF's understanding has been contrary to this practice, there are serious movements in the international order of border closure and growing isolation, losing the initial idea at the moment of the deliberation for the creation of human rights, that is, of union, of a collective, universalist thought, as opposed to individualism and the particularism of nation-states. What the end of human rights will imply in the future is not yet known, but what is clearly perceived is that this lack of search for fulfillment clarifies that the project of rational progress that was proposed for humanity is slowly coming to an end.

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